UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SCOT A. RASMUSSEN, Appellant, v. DEPARTMENT OF AGRICULTURE, Agency.	)	DOCKET NUMBER CH07528810690 DATE: MAR 09 1990

Earl A. Charlton, Esquire, Milwaukee, Wisconsin, for the appellant.

Dale E. Gentry, Milwaukee, Wisconsin, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant has petitioned for review of the initial decision, issued January 13, 1989, that sustained the agency's removal action. For the reasons discussed below, we GRANT the appellant's petition under 5 U.S.C. § 7701(e)(1), AFFIRM the initial decision as modified by this Opinion and Order, and MITIGATE the removal penalty to a 30-day suspension.

BACKGROUND

The appellant was a GS-5 Social Services Assistant at the agency's Blackwell Civilian Conservation Center near Laona, Wisconsin, which provides training to educationally and

vocationally disadvantaged men and women. Students at the Center, who range in age from 16 to 22 years, reside in dormitories while undergoing training. The appellant was an assistant director at a male dormitory, and was responsible for supervising and counseling students during their non-training time.

The agency charged the appellant with taking a 22 year old female student to his residence overnight without authorization, and with later denying that he had done so. The student left the Center without permission at about 5:00 p.m. on May 9, 1988. When the appellant was leaving the Center to take his break at about 7:45 that evening, his supervisor told him to look for the student in Laona. The appellant found her there, drinking at a bar. He asked her to return to the Center with him, but she refused to do so. On his way back to the Center, the appellant stopped at the residence of Virgil Quade, a Social Services Assistant at the student's dormitory, and advised him of the situation.

When his shift ended at midnight, the appellant returned to the bar, where he found the student and Quade drinking. All three remained at the bar till it closed at 2:00 a.m., by which time the student was extremely intoxicated. Outside the bar, Quade and the student had an altercation, and Quade drove off. The student walked to a nearby bait shop, and had the

owner contact the sheriff's department to report an assault by Quade.[1]

The student returned to the bar, where she informed the appellant and the bar owner that she had called the sheriff's office to report an assault by Quade. The appellant testified that while he and the bar owner were talking, the student again disappeared. When he went to leave a few minutes later, the appellant found the student passed out in his truck. He testified that he shook her awake and asked her where she wanted to go. She replied that she wanted to go back to her home in Flint, Michigan. He told her that he would let her

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[1] There was conflicting evidence as to whether and under what circumstances Quade may have struck the student during their altercation. The student told the proprietor of the bait shop that an instructor at the Center had assaulted her. Agency File (A.F.), Tab 4D (Statement of Skip Yaeger; Sheriff's Department Report). After returning to the Center, she told a sheriff's officer that she had struck Quade several times, but that he had simply blocked her blows. She explained that she had cut her lip falling over a fence in the woods. This latter assertion is demonstrably false in two respects, however: She did not spend the night in the woods; and the investigator's report indicates that the student had a "fat lip" at the time she went to the bait shop. The student again said that Quade did not strike her in a statement given to the agency's investigator on May 25. A.F., Tab 4F.

In a later statement made to the Center's Director, the student said she had previously lied. She again said that she struck Quade first, but stated that Quade then struck her in the mouth, at which point she screamed. *Id.* The appellant testified that he and the bar owner heard the student screaming, and both went toward where Quade's car had been parked. By the time they got there, the student and Quade's car were gone. Quade told another employee the next morning that he had had "quite a bit" to drink that night, that he didn't think he had struck the student, "but I'm worried maybe I did." *Id.* (Statement of John Houts).

stay at his house that night, and take her to the bus station the next day.

The appellant testified that he let the student sleep in a spare bedroom at his home. At about 9:00 a.m. the next morning, a county sheriff's officer called the appellant and asked him if he knew where the student was. He replied that he did not. A.F., Tab 4D (Report of Jerry G[illegible]on). About 10:00 a.m., Quade and two other Center employees arrived at the appellant's residence, where they found him and the student. After some discussion, one of the employees returned the student to the Center, and told the Center Director that he had found her walking along the highway toward the Center.

The agency's investigator questioned and obtained written statements from the appellant and the other three employees. Each of the employees except the appellant told the investigator that the student had been at the appellant's home. The appellant provided a written statement which concludes as follows: "At closing time Mr. Quade tried to take the student back to Center. She ran out of the bar and could not be found .... I left for home and Mr. Quade's car left also." A.F., Tab 4F. The investigator testified that he asked the appellant if his statement told the whole story, and that the appellant said that it did. The investigator further testified that he asked the appellant directly whether the student had been at his home, and that the appellant responded that she had not been. The appellant testified that the investigator never asked him directly whether the student had

been at his home. After the agency issued its notice of proposed removal, the appellant submitted a second written statement in which he admitted that the student spent the night at his house. A.F., Tab 4D.

In his initial decision, the administrative judge found that the agency had sustained its charge that the appellant violated its anti-fraternization policy by taking a female student to his home without authorization. He further found that this off-duty misconduct adversely affected the efficiency of the service, because it interfered with the agency's mission in training and caring for disadvantaged young people in a residential setting far away from their homes, and with the agency's concomitant duty to account for the students' whereabouts.

The administrative judge ruled that he need not determine the truth of the agency's second charge -- that the appellant lied to the agency's investigator about the student being at his residence -- because that charge was improper. He found that, under *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1574-75 (Fed. Cir. 1988), an employee's denial of charged misconduct cannot itself constitute a separate offense.[2] The administrative judge concluded, however, that removal was warranted for the fraternization charge alone, considering the seriousness of the offense, the appellant's

[2] We need not decide whether the administrative judge erred in not sustaining the charge that the appellant made false statements to the agency investigator because the agency has not cross-petitioned for review of that finding.

limited period of employment (2 years), and a prior oral warning regarding fraternization.[3]

In his petition for review, the appellant does not deny that he violated the Center's anti-fraternization policy by taking a female student to his home overnight without authorization, or that off-duty fraternization can have a detrimental effect on the efficiency of the service. He argues, however, that the administrative judge erred in sustaining the removal penalty for the following reasons: (1) He failed to consider fully the mitigating circumstances; (2) the agency failed to justify the lesser penalties given other employees involved in the events of May 9-10; and (3) punishing his off-duty contact with the student would violate his constitutional right to freedom of association.[4]

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[3] The oral warning for fraternization concerned an incident on April 18, 1988. A female student had complained that the appellant made her feel uncomfortable when he sat next to her and attempted to hold her hand during a bus trip. *See* A.F., Tab 4F (Statement of Roger Horne). The appellant explained that he merely patted the back of the student's hand in letting her down easy after the student had unsuccessfully tried to initiate a social contact with him. *See* A.F., Tab 4D. The agency cited this incident, not as a prior disciplinary action justifying an enhanced penalty, but as evidence that the appellant had been made aware of the anti-fraternization policy shortly before the incidents of May 9-10, 1988. *See* A.F., Tab 4C.

[4] The Board need not, and does not, consider the appellant's constitutional argument because he has raised it for the first time in his petition for review. *Cf. Anderson v. Veterans Administration*, 3 M.S.P.R. 71, 74 (1980) (Board will review an allegation of discrimination raised for the first time in a petition for review only if employee did not know of the existence of a basis for the allegation at the time he filed his petition for appeal).

ANALYSIS

The maximum reasonable penalty is a 30-day suspension.

The Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). We agree with the appellant that the administrative judge failed to give sufficient weight to the mitigating circumstances surrounding the appellant's decision to take the student to his home.

The appellant was faced with a very difficult situation when he found the student in his truck. It was after 2:00 a.m., the whole town was dark due to a power outage, it was six miles back to the Center, and the student was so intoxicated that she had passed out. The appellant maintains that he could not abandon the student without shelter at that hour in her condition, and he could not take her back to the Center without her consent. The administrative judge discounted the appellant's claim that he lacked the authority to take the student to the Center against her will on the basis that, because she weighed only about 100 pounds and was extremely intoxicated, she could not have physically resisted the appellant. *See* Initial Decision at 6-7. This rationale misses the point. No one has the legal or moral right to take another person somewhere against her wishes simply because she

is unable to resist.[5] The appellant's expressed belief that the student did not consent to return to the Center is supported by the student's explicit refusal to return on numerous occasions during the course of the night and early morning hours, and by her statement in the truck that she wanted to return to her home in Flint, Michigan.

Even if the appellant felt that he had no alternative to taking the student home,[6] however, he showed poor judgment in failing to promptly inform his superiors of his action and to seek their counsel as to what to do next. The appellant admits that in hindsight it would have been a good idea to call his supervisor or the Center's Director in the early morning hours of May 10, but he asserts he was acting under exigent circumstances. No exigent circumstances existed the next morning, however, when the sheriff's officer called and asked the appellant if he knew where the student was. Although alerted by this call to the Center's concern for the

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[5] The Center's Director admitted in his testimony that the Center has no legal authority to force a student to remain at the Center against her wishes.

[6] The appellant had another option, which was not addressed in the initial decision or in the appellant's petition for review: He could have entrusted the student's care to the sheriff's department. At the time he left for home with the student, the appellant knew that a sheriff's officer was en route to the bar to investigate the student's assault complaint. Indeed, the appellant's testimony indicates that his plan to take the student home, and then to the bus station the next day, may have been motivated in part by a misguided desire to protect Quade and the Center from the student's allegation of an assault. *See* Hearing Tape, side 2A. There was no evidence, however, that the appellant was acting for self-interested reasons in taking the student to his home.

student's safety and whereabouts, the appellant lied and told the officer that he did not know where she was. Nor did he inform the Center of the student's whereabouts during the hour between the officer's call and the arrival of Quade and the other employees at his residence.[7]

The Center's director testified that its anti-fraternization policy is essential in maintaining the students' trust, credibility, and respect in staff members. The appellant's violation of that policy on the night of May 9-10, 1988, thus went to the heart of his duties as a Social Services Assistant, causing students and staff to lose confidence in him. In addition, the agency's deciding official could properly consider the appellant's prior oral warning for fraternization as a factor adding to the seriousness of the offense. *See Gober v. Department of the Navy*, 15 M.S.P.R. 354, 357 (1983). As discussed above, however, the seriousness of the appellant's offense was mitigated by his lack of time to reflect on a proper course of action when faced with a very difficult situation. He could have further ameliorated the seriousness of his offense the

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[7] Whenever an agency's action is based on multiple charges, not all of which are sustained, the Board will consider whether the sustained charges merit the penalty imposed by the agency. *Douglas*, 5 M.S.P.R. at 308. In making this determination, the Board will consider all factors related to the reasonableness of the penalty imposed. *Id.* Even though the Board has not sustained the charge regarding misrepresentation, we can consider the appellant's actions on the morning of May 10 as they relate to his argument that the seriousness of his fraternization offense was mitigated by the difficult circumstances with which he was faced.

following morning by advising the Center and the law enforcement officials of his actions and the student's whereabouts, but he instead chose to cover up his actions.

We conclude from our review of the entire record that the agency exceeded the bounds of reasonableness in imposing the removal penalty. Even when the Board does find a penalty to be excessive, however, the corrected penalty to be specified is not necessarily the one that the Board would find to be most reasonable, but rather the maximum penalty that the Board would find to be within the parameters of reasonableness. *Davis v. Department of the Treasury*, 8 M.S.P.R. 317, 320-21 (1981). Considering all the facts and circumstances in this case, we find that a 30-day suspension is the maximum reasonable penalty that could have been imposed.

The appellant's allegations of disparate penalties do not require a lesser penalty than a 30-day suspension.

In addition to arguing the existence of mitigating circumstances, the appellant asserts that removal was an unduly harsh penalty in light of the lesser penalties imposed on the other employees involved in the events of May 9-10. To make out a claim of disparate treatment, the charges and the circumstances surrounding the charged behavior must be substantially similar. *Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983). The appellant's allegations of disparate treatment vis-à-vis two of the three other employees do not meet this requirement. John Houts was given a two-week suspension for falsely reporting to the

Center's Director that he [illegible] student walking along the highway rather than at [illegible] ellant's residence. John Calhoun was given a letter [illegible]ning for having knowledge of this false report and [illegible] coming forward with the true information. It is o[illegible]ous that these offenses were dissimilar in both nature and seriousness to those committed by the appellant.

It is much less clear, however, whether the offenses of Virgil Quade, who received a two-week suspension, were dissimilar or less serious than those of the appellant. Although he did not take a female student to his residence, he too violated the Center's anti-fraternization policy by drinking with the student at the bar, and, like the appellant, he participated in the cover-up of the events of that night and morning. Indeed, Quade's behavior might be viewed as more serious than the appellant's in several respects: Quade's fraternization with the student at the bar was more extensive than the appellant's;[8] he apparently drank to excess while fraternizing with the student; he got into a physical altercation with the student; and he appears to have been willing to abandon the student without shelter in the middle of the night despite her extreme state of intoxication, a course of action that the appellant properly rejected. *See supra* at 2-3.

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[8] Quade was at the bar with the student from about 8:00 p.m. to 2:00 a.m. The appellant was at the bar from midnight to 2:00 a.m. *See* A.F., Tab 4F (Statements of Quade and Houts).

Even if the appellant made out a claim of disparate treatment vis-à-vis Virgil Quade, however, and even if the agency failed to rebut that claim,[9] it does not necessarily follow that the appellant's penalty must be reduced to the same penalty given Quade. The consistency of a penalty with those imposed on other employees for the same or similar offenses is only one factor to be considered in mitigation of an agency-imposed penalty. *Yeager v. General Services Administration*, 39 M.S.P.R. 147, 151 (1988); *Madrid v. Department of the Interior*, 37 M.S.P.R. 418, 424 (1988). Where an employee's punishment is appropriate to the seriousness of his offense, an allegation of disparate treatment is no basis for reversal or mitigation. *Yeager*, 39 M.S.P.R. at 151; *Quander v. Department of Justice*, 22 M.S.P.R. 419, 423 (1984), *aff'd*, 770 F.2d 180 (Fed. Cir. 1985) (Table). We conclude that a 30-day suspension is a reasonable and appropriate penalty under the facts of this case. We therefore need not, and do not, decide whether the appellant's penalty is consistent with that imposed on Virgil Quade.

ORDER

Accordingly, we ORDER the agency to cancel the appellant's removal and to replace it with a 30-day suspension

[9] An agency may refute a charge of disparate treatment by establishing a legitimate reason for the difference in treatment, either by showing that the offenses in question were not really equivalent, or that mitigating or aggravating factors justified a difference in treatment. *See Butler v. Department of the Navy*, 23 M.S.P.R. 99, 100 (1984); *Gage v. Department of the Air Force*, 11 M.S.P.R. 147, 149 & n.5 (1981).

retroactive to the date of the improper removal. This action must be accomplished within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the Board's final order in this appeal. *See* 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.